

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 22 May 2007

In the Matter of

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR
Plaintiff

v.

BANK OF AMERICA
Defendant

Case No. 2006-OFC-00003

Ann G. Paschall, Esq.
Atlanta, GA
For the Plaintiff

Bruce M. Steen, Esq.
Aaron J. Longo, Esq.
Charlotte, NC

W. Carter Younger, Esq.
Richmond, VA
For the Defendant

Before: JEFFREY TURECK
Administrative Law Judge

RECOMMENDED ORDER ENFORCING ON-SITE REVIEW¹

This matter arises under Executive Order 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), as amended by Executive Orders 11,375, 12,086, and 13,279 (32 Fed. Reg. 14,303; 43 Fed. Reg. 46,501; 67 Fed. Reg. 77,141) (“Executive Order”) and the implementing regulations at Title 41, Chapter 60 of the Code of Federal Regulations. On August 23, 2006, the United States Department of Labor, Office of Federal Contract Compliance Programs (“OFCCP” or “plaintiff”) filed an administrative complaint alleging that Bank of America Technology and Operations, Inc. (“BATO”), at the time a wholly-owned subsidiary of Bank of America

¹ Citations to the record of this proceeding are abbreviated as follows: PX – Plaintiff’s Exhibit; DX – Defendant’s Exhibit; TR – Hearing Transcript.

(“defendant”), violated the Executive Order and 41 C.F.R. §60-1.43² when it failed to allow OFCCP to perform an on-site review of its facility at 200 North College Street in Charlotte, North Carolina. The complaint was filed under the expedited hearing procedures set forth at §60-30.31, *et seq.*³ BATO filed an answer on September 11, 2006, denying any violation of the Executive Order and regulations, setting forth defenses and requesting a hearing with this Office. BATO also filed a motion to remove the administrative complaint from the expedited hearing procedures, asserting that OFCCP’s invocation of the procedures denied defendant the opportunity to determine whether its selection for review was in accord with the Fourth Amendment.

On September 29, 2006, I held a conference call with counsel for both parties. During that call, I rejected OFCCP’s argument for the application of the expedited hearing procedures (*Order and Notice of Hearing* dated Oct. 4, 2006). On November 21, 2006, OFCCP filed a motion for summary judgment contending that Bank of America⁴ had no legitimate basis upon which to refuse the on-site review of the BATO facility. A formal hearing was held on December 6, 2006 in Charlotte, North Carolina. At the hearing, I denied the summary judgment motion on account of OFCCP’s failure to meet its burden of proving a violation of the Executive Order (TR at 13-15). Five witnesses testified, and Plaintiff’s Exhibits 1-7 and Defendant’s Exhibits 1-8 were admitted into evidence. The record closed at the hearing, and the parties timely filed post-hearing briefs and reply briefs.

Based on the evidence contained in the record of this proceeding, I find that the Fourth Amendment does not preclude OFCCP from conducting an on-site review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Executive Order 11,246

The Executive Order prohibits Federal contractors and subcontractors (“contractors”) from discriminating against employees or applicants for employment on the basis of race, color, sex, religion, or national origin, and requires contractors to take affirmative action to provide equal employment opportunities. Exec. Order §202(1); §§60-1.1, 1.4, 1.40; 60-2.1 – 2.35. Financial institutions with 50 or more employees that issue and are paying agents for United States Savings Bonds, are required to develop and maintain written Affirmative Action Plans (“AAP”) for each of their establishments. §60-2.1(b)(1)(iv) & (b)(2)(iv). The Secretary of Labor is responsible for enforcing contractor compliance with the Executive Order, and OFCCP is empowered to conduct compliance evaluations of contractors to determine whether they are

² All of the regulations cited in this *Order* are contained in Title 41, Chapter 60 of the Code of Federal Regulations.

³ The expedited hearing procedures limit the discovery options available to the parties, allowing only for the use of: requests for admissions, requests for the opposing side’s witness list and, upon a showing of good faith, depositions. §60-30.33(c).

⁴ During the conference call, counsel for defendant represented that BATO no longer exists as a discrete entity and has since been absorbed into Bank of America (*Order and Notice of Hearing* dated Oct. 4, 2006).

taking affirmative action and providing equal opportunity in their hiring and employment practices. Exec. Order §§202(5), 205; §§60-1.1; 60-1.20 – 1.34; 60-1.40; 60-2.1 – 2.35.

OFCCP's compliance evaluations may consist of compliance reviews, off-site records reviews, compliance checks, and focused reviews. §60-1.20(a)(1)-(4). Compliance reviews, which the regulations define as a "comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written [AAP], and the results of the [AAP] efforts undertaken by the contractor" may proceed in three stages. §60-1.20(a)(1). First, OFCCP may conduct a desk audit at its offices of the written AAP and supporting documentation. §60-1.20(a)(1)(i). If the desk audit of the AAP and supporting documentation reveal "unresolved problem areas," OFCCP may then conduct an on-site review of the contractor's establishment. §60-1.20(a)(1)(ii). This on-site review may involve an examination of the contractor's personnel and employment policies as well as inspections of documents and interviews with employees. *Id.* Finally, and, "[w]here necessary," OFCCP may conduct an "off-site" analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review. §60-1.20(a)(1)(iii). If a contractor refuses to submit to a compliance evaluation, OFCCP may bring an enforcement action before a Department of Labor administrative law judge.

In the event that a compliance evaluation discloses deficiencies, OFCCP may resolve them through conciliation or persuasion. §60-1.20(b); *see also* §60-1.33. The contractor then has the opportunity to correct the deficiencies without the institution of enforcement proceedings. §60-1.20(b). In the event that OFCCP has "reasonable cause" to believe that a contractor has violated the equal opportunity clause of the Executive Order, the agency may require the contractor to show cause why enforcement proceedings or other action should not be instituted. §60-1.28. The contractor then has 30 days to correct the violation or show cause why monitoring, enforcement proceedings, or other action to ensure compliance should not be instituted. *Id.* If conciliation, persuasion, or the contractor's efforts to resolve issues delineated in the show cause notice fail to correct the deficiencies, OFCCP may initiate administrative enforcement proceedings against the contractor. §§60-2.2; 60-1.26.

Background

Defendant is a financial institution that issues, and is a paying agent for, United States Savings Bonds (*Defendant's Responses to Plaintiff's Requests for Admissions*, at 2). As of February 27, 2004, the date on which it was selected for a compliance review under the Executive Order, BATO performed services for and was a wholly-owned subsidiary of defendant (*id.* at 2-3; TR at 33-34). BATO's facility was located at 200 North College Street in Charlotte, North Carolina (PX 1; TR at 33). By letter dated February 27, 2004 ("scheduling letter"), OFCCP notified defendant's Senior Vice President for Workforce Compliance and Diversity, Josephine Bryant, that BATO had been selected for a compliance review (PX 2; TR at 29-30, 91-93). The scheduling letter informed defendant of the three possible stages of the compliance review and requested that defendant submit its AAP and other specified employment data so that OFCCP could perform a desk audit (PX 2).

"Within days" of receiving the scheduling letter, Ms. Bryant drafted a letter asking OFCCP to confirm in writing the process by which BATO was selected for the compliance

review (DX 6; TR at 99). By letter dated March 24, 2004, plaintiff explained that OFCCP Order ADM 01-1/SEL (“Selection Order” or “order,” DX 1) provided that contractors were to be selected for compliance reviews in the “order of their listing on the Equal Employment Data System (EEDS) document generated for each OFCCP field office” (DX 7). The letter stated that BATO was selected “in order” from the “current EEDS Random computer list dated June 27, 2002 for the Charlotte [, North Carolina] District” (“2002 EEDS list”) (*id.*; TR at 100-01).

Defendant timely submitted its AAP⁵ and other data to OFCCP, which then performed the desk audit (TR at 30-31, 66-68, 81). By letter dated September 23, 2004, OFCCP informed defendant that the desk audit revealed “indicators of a need for further in-depth investigation of [BATO’s] compensation practices” (PX 3). Included in this letter were tables indicating that BATO paid men more than women and non-minorities more than minorities in several job classifications (*id.*). The letter states, however, that the desk audit results were “rudimentary at best” and that OFCCP had not found a problem with BATO’s compensation system (*id.*). Former North Carolina District Director Jerome Geathers and Assistant District Director Samuel Maiden testified that the desk audit indicated possible problems in BATO’s compensation system (PX 3; TR at 30-31, 44-45, 59-61, 63-64). The letter requested that defendant remit additional employment data, and defendant complied, submitting the requested data as well as its explanation for the differences in employee pay at the BATO facility (DX 3; TR at 94-98).

On November 4, 2004, OFCCP’s regional office in Atlanta, Georgia performed a regression analysis of defendant’s data (TR at 87-88, 111-19). The regression analysis was not admitted into evidence, but, according to the testimony, it revealed a standard deviation of 2.9 with respect to the salaries paid to women in the “operational analyst” job group as compared to salaries paid to men in similar positions (TR at 120-21). Mr. Cirino understood the regression analysis to reveal “overall indicator[s] of salary disparities against women” and salary disparities against women in this one job group (TR at 83). However, Dr. Carol Amidon, a labor economist, testified that the regression analysis combined employees in the same cluster grouping who were not “similarly situated” (TR at 111-12, 115-18). Instead, it initially grouped employees according to job title and subsequently grouped them according to job title and salary (TR at 115). In OFCCP’s “final clustering,” the agency allowed persons with different job titles to be included in the same cluster (TR at 116). Dr. Amidon explained that the analysis also lacked variables that would be “typically include[d] in a compensation analysis, such as education [and] performance,” and appears to have “double count[ed]” for the variable of employee experience between the employee’s time at the bank and time at his or her particular job (TR at 112-13). Additionally, Dr. Amidon explained that only 64% of BATO’s employees were included in the regression data, instead of the 80% recommended by OFCCP’s own guidelines (TR at 113-14, 119). Dr. Amidon stated that no conclusions could be drawn about employee compensation at BATO from the regression analysis (TR at 119-20).

Subsequent to the completion of the regression analysis, Ms. Bryant submitted additional data to OFCCP concerning position descriptions and employee’s ages and dates of birth (DX 4-5; TR at 88-89, 95-98). Mr. Maiden stated that OFCCP had a “difficult time” forming “similarly

⁵ The AAP was not offered into evidence, but the parties stipulated that the plan was a “common plan” used by Bank of America for all of its facilities (TR at 66).

situated” groups of employees based on the position descriptions provided by defendant (TR at 59). Accordingly, OFCCP decided to come on-site to BATO’s facility at 200 North College Street to interview employees concerning their duties and managers involved in BATO’s compensation system (TR at 60). OFCCP scheduled the on-site review for April 19, 2005 (PX 4; TR at 61).

Six days before the on-site review was to have taken place, defendant’s counsel made a request under the Freedom of Information Act for documentation explaining how OFCCP selected BATO for a compliance review (TR at 84; PX 6). OFCCP supplied defendant with documentation of its selection procedures (TR at 84; PX 6). On April 18, 2005, Ms. Bryant informed Mr. Maiden that OFCCP would not be allowed to conduct its on-site review of BATO as scheduled (TR at 62-63; PX 6). On June 10, 2005, Director of Regional Operations Donald Cirino, Jr. held a conference call during which defendant’s counsel asserted that BATO should not have been scheduled for a compliance review because Bank of America was already the subject of an ongoing OFCCP enforcement action (TR at 84-85; PX 6-7).⁶ OFCCP countered that the ongoing investigation involved Bank of America’s corporate headquarters, which was identified by a separate contractor number (PX 6; *see also* PX 1).

On December 9, 2005, OFCCP issued a *Notice to Show Cause* why enforcement proceedings should not be initiated against BATO for its failure to allow OFCCP personnel to conduct an on-site review to interview employees and access additional records (PX 6). Defendant did not allow OFCCP to enter BATO’s premises to conduct the on-site review within 30 days, and OFCCP filed the instant administrative complaint on August 23, 2006. As of the date of the hearing, OFCCP still had not been allowed to enter BATO’s premises to conduct the on-site review (TR at 63).

OFCCP’s Selection Plan and Selection of BATO for the Compliance Review

The Selection Order, which contained “guidance for [OFCCP’s] scheduling [of] non-construction supply and service contractor establishments ... for compliance evaluations[.]” provided that OFCCP district offices were to schedule compliance evaluations in “strict sequential order[.] beginning with the first contractor establishment at the top of the first page of the [EEDS list]” and continuing in sequential order down the list (DX 1 at 5). The order provided a list of 15 reasons for not conducting compliance evaluations of a contractor which was next on the EEDS list, one of which was the written permission of OFCCP’s Director of Program Operations or his designee “where good cause is shown for such an exception” (*id.* at 5-6). If a contractor was not selected for review on account of one of these exceptions, OFCCP was to complete and keep on file a Contractor Non-Scheduling Documentation Form, which indicated

⁶ OFCCP had previously filed an administrative complaint against Bank of America (then Nationsbank Corporation) in Case No. 97-OFC-16, *OFCCP, U.S. Dep’t of Labor v. Nationsbank Corp.* (PX 7). This complaint alleges that Nationsbank violated the Executive Order by failing to hire minority applicants for certain clerical and administrative positions (*id.* at 2). Bank of America is currently a party to litigation pending before this Office which stems from that complaint and the 1993-94 investigation that preceded its filing (*see* TR at 39-40, 43-44, 98-99).

the reason for non-selection (*id.* at 6). Additionally, OFCCP was supposed to note the non-selection, its date and reason on the EEDS list (*id.*).

The evidence establishes that in February of 2004, OFCCP utilized two documents, the EEDS list generated on June 27, 2002 (a redacted portion of which was admitted into evidence, PX 1) and the Selection Order (DX 1), to schedule contractors for compliance evaluations. OFCCP “generally” adhered to the Selection Order, and plaintiff’s national and regional offices could instruct district offices to comply with additional or modified procedures or directives concerning contractor selection (TR at 26-28, 33-34, 49-53, 75-78). Selecting officials were to go down the contractor listings on the 2002 EEDS list one by one, either scheduling the contractor for review or documenting the non-selection and reason (TR at 34-35). When a contractor was selected for review, OFCCP was to note the selection and date on the EEDS list, enter the selection date into its computer database and save a copy of the scheduling letter in the contractor’s file (TR at 34-35, 76-77). In addition to the 15 reasons enumerated in the Selection Order, OFCCP district offices had been informed that a contractor’s involvement with OFCCP’s Equal Opportunity Survey (“EO Survey”) was a reason to skip over that contractor for a compliance review (TR at 39-42, 49-51, 77-78, 130).⁷

Mr. Geathers was the OFCCP official who selected BATO for its compliance review (TR at 26). BATO appeared as contractor number 7599 on the 2002 EEDS list for Charlotte, North Carolina (*id.*; PX 1). In selecting BATO, Mr. Geathers testified that he simply “went straight down the EEDS list in sequential order” (TR at 26). When contractors were “skipped over,” Mr. Geathers testified that the reason was noted on the scheduling list and that he “continued to go down the list” selecting or rejecting contractors until he reached BATO (TR at 26-28). Additionally, he testified that when a contractor was not selected, contractor non-scheduling documentation forms were to be completed (TR 34-35). Further, several contractors listed above BATO on the EEDS list were not selected for review on account of their involvement with OFCCP’s second round of the EO Surveys (TR at 39-42, 49 52-55, 127). Mr. Geathers testified that he did not single out BATO for a compliance review (TR at 32).

Discussion

Defendant contends that the administrative complaint should be dismissed because OFCCP violated the Fourth Amendment when it selected BATO for the compliance review without following the neutral administrative plan contained in the Selection Order. Specifically, Bank of America argues that OFCCP violated the Selection Order when it: selected BATO in 2004 from a “stale” EEDS list generated in 2002; failed to properly document its selection choices on the 2002 EEDS list; improperly rejected contractors listed above BATO that were involved with the EO Survey; and failed to skip over BATO on account of Bank of America’s

⁷ In 2001, as part of its effort to modify its methods of data collection, OFCCP had issued a round of EO Surveys to contractors (TR at 40, 102-03; *see also* DX 8). A second round of surveys was issued at a subsequent date (TR at 104-05, 124-25). One hundred forty-seven of Bank of America’s facilities, BATO among them, received EO Surveys in January, 2001 (DX 8; TR at 102-04, 124). There is no indication that BATO received an EO Survey during the second round.

involvement in an ongoing compliance review. Defendant also contends that the regression analysis did not provide OFCCP with specific evidence of a violation of the Executive Order that would justify an on-site review of the BATO facility. OFCCP contends that BATO was selected in accordance with a neutral administrative plan and that the Selection Order conferred no rights on defendant. OFCCP also argues that the regression analysis gave plaintiff the specific evidence it needed to schedule an on-site review of the BATO facility.

Fourth Amendment Standards

The Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property. *Donovan v. Dewey*, 452 U.S. 594, 598 (1981); *OFCCP, U.S. Dep't of Labor v. Bank of America*, ARB No. 00-079, at 10-11 (Mar. 31, 2003). However, "unlike searches of private homes, which generally must be conducted pursuant to a warrant, [] legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment." *Dewey*, 452 U.S. at 598. In *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978), the Supreme Court held that an administrative agency must show probable cause for a search of commercial property to be valid under the Fourth Amendment. Probable cause is established when a company is chosen according to "reasonable legislative or administrative standards" or there is "specific evidence of an existing violation." *Id.*

These "firmly rooted" Fourth Amendment principles apply to OFCCP investigations of contractors under the Executive Order. *United States v. Mississippi Power & Light Co.*, 638 F.2d 899 (5th Cir. Unit A 1981); *OFCCP, U.S. Dep't of Labor v. Beverly Enterprises*, 130 F. Supp.2d 1, 13-17 (D.D.C. 2000); *Bank of America*, ARB No. 00-079, at 12. In *Mississippi Power*, the Fifth Circuit interpreted *Marshall* to require that warrantless administrative searches be measured against the broad Fourth Amendment test of "reasonableness." *Mississippi Power*, 638 F.2d at 907. A proposed search is reasonable if it is: (1) authorized by statute; (2) properly limited in scope; and (3) initiated in a proper manner. *Id.* Searches proposed by OFCCP under the Executive Order meet the first two criteria as a matter of law. *Id.*⁸ As to the third element, plaintiff's decision to initiate a search would be proper if that decision was based on: (1) specific evidence of an existing violation; (2) reasonable legislative or administrative standards that have been met with respect to a particular contractor; or (3) a showing that the search was initiated pursuant to an administrative plan containing specific, neutral criteria. *Id.* (citing *Marshall*, 436 U.S. at 320-23).⁹ And although contractors agree to keep their facilities open for on-site reviews and to furnish OFCCP with information necessary to determine whether they are complying with the Executive Order (§§60-1.7; 60-1.12; 60-1.20; 60-1.40; 60-1.42-43; 60-2.10-17; 60-2.32),

⁸ But see *Beverly Enterprises*, 130 F. Supp.2d at 15-16 (discussing all three elements of the *Mississippi Power* test).

⁹ The last two elements of the *Mississippi Power* reasonableness test duplicate each other, and an analysis of whether OFCCP utilized a plan with neutral criteria to select a contractor for review is "essentially the same as" an analysis of whether the agency followed reasonable legislative or administrative standards. *OFCCP v. Beverly Enterprises*, ARB No. 99-112, at 13 n. 3 (Sept. 1, 1999) (citing *First Alabama Bank of Montgomery v. Donovan*, 692 F.2d 714, 714 n. 2 (11th Cir. 1982)).

their consent is not the equivalent of consent to be the target of a search resulting from a constitutionally flawed selection process. *See First Alabama Bank*, 692 F.2d at 714, 716, 719-21. Contractors only consent to those warrantless administrative searches that “comport with constitutional standards of reasonableness.” *See United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 100, 103 (5th Cir. 1992).

Whether OFCCP actually used neutral criteria in selecting a contractor for review is a question of fact. *Mississippi Power*, 638 F.2d at 908. The Fourth Amendment prohibits administrative searches that are the product of the “unreviewed discretion of the enforcement office in the field,” (*id.*, citing *See v. Seattle*, 387 U.S. 541, 545 (1967)), and OFCCP bears the burden of showing that its administrative plan was applied neutrally to the agency’s decision to select a contractor. *See United States v. New Orleans Pub. Serv., Inc.*, 723 F.2d 422, 425-28 (5th Cir. 1984). However, OFCCP has no obligation to select contractors for compliance reviews in accordance with the dictates of any particular internal agency manual. *Bank of America*, ARB No. 00-079, at 21-22 (citing *Sunbeam Appliance Co. v. EEOC*, 532 F. Supp. 96, 99 (N.D. Ill. 1982) and *Hall v. EEOC*, 456 F. Supp. 695, 702-03 (N.D. Cal. 1978)). OFCCP’s only obligation is to utilize selection procedures that meet the Fourth Amendment’s requirements as outlined in *Marshall* and *Mississippi Power*. *Id.*

In *OFCCP, U.S. Dep’t of Labor v. City Pub. Serv. of San Antonio*, Case No. 1989-OFC-5 (Ass’t Sec’y Jan. 18, 1995), a case arising under §503 of the Rehabilitation Act, the Assistant Secretary articulated the standard for “specific evidence” sufficient to establish probable cause. “[T]he evidence of specific violation required to establish administrative probable cause [is] less than that needed to show a probability of a violation [but] must . . . show that the proposed search is based upon a reasonable belief that a violation has been committed.” *Id.* at 10 (quoting *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 958 (11th Cir. 1982)). Alternatively, the amount of evidence required must be “sufficient to support a reasonable suspicion of a violation” or “some plausible basis for believing that a violation is *likely* to be found.” *West Point-Pepperell*, 689 F.2d at 958 (quoting *Marshall v. Horn Seed Co.*, 647 F.2d 96, 102 (10th Cir. 1981)) (emphasis in original).

Consent Exception

However, even if OFCCP cannot demonstrate the probable cause or specific evidence necessary to show that its selection of BATO for a compliance review was reasonable, Bank of America’s voluntary, contemporaneous consent would remove any constitutional impediment to the search. *Bank of America*, ARB No. 00-079, at 13-14; *Dep’t of Labor, OFCCP v. Bank of America*, 1997-OFC-00016, at 6-7 (ALJ *Recommended Decision and Order on Cross-Motions For Summary Judgment*, August 11, 2004). A “well settled” exception to the Fourth Amendment’s requirement of probable cause, a subject’s consent may render lawful a warrantless search as long as the consent is “voluntarily given, and not the result of duress or coercion, express or implied.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 218, 248-248 (1973). In *Bustamonte*, the Supreme Court recognized that the issue of the “voluntariness” of a subject’s consent fell between the government’s interest in effectively enforcing the law and society’s deep interest in notions of fairness, privacy, and justice. *Id.* at 225. No single criterion can establish the existence of coercion, or, as the Supreme Court has defined it, the instance in which

a subject's "will has been overborne." *Id.* Accordingly, "[v]oluntariness is a question of fact to be determined from all of the circumstances[.]" and "careful scrutiny" of these circumstances to determine the presence of absence of government coercion is required. *Id.* at 226-27, 248-49. In performing the totality analysis, the characteristics of the subject from whom consent is sought and the circumstances surrounding the request for consent must be considered. *See United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996).

Voluntary consent can be established by proof of contemporaneous consent given at the time of the search. *Bank of America*, ARB No. 00-079, at 14-15 (citing a host of federal decisions allowing administrative searches where contemporaneous consent was given). A subject's failure to "object, challenge, or otherwise disagree with an official search" is a "highly relevant" factor to consider in determining whether a subject has given contemporaneous consent. *Bank of America*, 1997-OFC-00016, at 15 (citing *United States v. Cotnam*, 88 F.3d 487, 495 (7th Cir. 1995) and *Bustamonte*, 412 U.S. at 222).

Finally, "[a] consent to search is not irrevocable, and ... if a [subject] effectively revokes consent prior to the time the search is completed, then the [government] may not thereafter search in reliance upon the earlier consent." 3 Wayne R. LaFare, *Search and Seizure* §8.2(f), at 674 (3d ed. 1996) (footnote omitted), *quoted in Lattimore*, 87 F.3d at 652. It is well-established that the subject of a search may "delimit as he chooses" the scope of the search for which he has given consent. *Florida v. Jimeno*, 500 U.S. 248, 252 (1991). And "once consent is withdrawn or its limits exceeded," the conduct of government officials must be measured against the Fourth Amendment's requirements. *United States v. McFarley*, 991 F.2d 1188, 1191 (4th Cir. 1993).

Use of the 2002 EEDS List

Defendant's first contention is that OFCCP violated the Selection Order by selecting BATO for a compliance review in 2004 from the nearly two-year old EEDS list generated in 2002. Defendant argues that OFCCP was required to select contractors from an annually updated EEDS list and that OFCCP's use of a "stale" EEDS list destroyed the "randomness" in contractor selection that defendant contends the Selection Order was meant to preserve.

I find that OFCCP's use of the 2002 EEDS list did not deprive defendant of its right under the Fourth Amendment to have its facilities selected for compliance reviews pursuant to a neutral administrative plan. While OFCCP's contractor selection process was guided by the Selection Order, plaintiff's national office and regional offices retained the ability to supplement the general framework for contractor selection contained in the order with another selection plan to be used in particular circumstances. *See Bank of America*, ARB No. 00-079, at 21-22 (discussing OFCCP's ability to amend or modify its selection manuals). In this case, OFCCP implemented a neutral plan for the selection of contractors in 2004. Under this plan, all district offices, including those in North Carolina, were required to select contractors for review in strict sequential order from the EEDS list generated on June 27, 2002 (*see* TR at 35, 75-76, 86). That OFCCP chose to require its district offices to continue to work their way through contractors as listed on the 2002 EEDS list did not suddenly infuse the 2004 contractor selection process with the unfettered discretion which was of such concern to the Fifth Circuit in *Mississippi Power*. By continuing to use the 2002 EEDS list, OFCCP was merely implementing a neutral modification

to its previously established selection procedure. The North Carolina district was required to and did comply with this element of OFCCP's neutral selection plan, and as an OFFCP official selecting contractors for compliance reviews on February 27, 2004, Mr. Geathers was required to utilize the 2002 EEDS list.

Furthermore, even if the Selection Order had required OFCCP to utilize annually updated scheduling lists,¹⁰ as an internal agency procedural guide the Selection Order conferred no right upon defendant to be selected in accordance with its provisions, and OFCCP's only obligation "vis-à-vis" defendant was to "utilize selection procedures that met Fourth Amendment requirements as articulated in [*Marshall*] and [*Mississippi Power*]." *Id.*

Perhaps tellingly, defendant does not make a serious effort in its post-hearing brief to argue that the use of the 2002 EEDS list was not neutral. Instead, relying on Mr. Geathers's testimony that, if given enough time, he would have gotten to every contractor on the list (TR at 35), defendant argues that use of the list destroyed the "randomness" in contractor selection that defendant alleges the Selection Order was supposed to preserve. But the Fourth Amendment does not require that OFCCP implement a *random* process for contractor selection; only a *neutral* process is required.

Documentation of Contractor Selection

Next, defendant argues that OFCCP failed to prove that it actually applied its neutral administrative plan of strict sequential selection when the agency selected BATO for a compliance review. Specifically, defendant contends that OFCCP failed to document whether certain contractors listed above BATO on the EEDS list had been selected or rejected for review prior to the date on which BATO was selected. Without this evidence, defendant contends that OFCCP cannot prove that it actually applied its strict sequential selection procedure to select or reject contractors listed above BATO on the 2002 EEDS list.¹¹ I agree with defendant and find that OFCCP has not met its burden to prove that it selected BATO for a compliance review pursuant to the agency's neutral administrative plan for contractor selection.

One hundred fifty-three contractors precede BATO on the 2002 EEDS list (PX 1). Mr. Geathers testified that it was OFCCP's policy to note right on the EEDS list the date contractors were scheduled for review. Yet, for 25 contractors listed above BATO on the EEDS list for which there was a notation that they had been selected for review (contractors 7448, 7450, 7452, 7453, 7459, 7460, 7464, 7471, 7472, 7473, 7474, 7475, 7478, 7510, 7517, 7518, 7519, 7520, 7523, 7524, 7525, 7526, 7527, 7528, 7577; *see* PX 1), dates of selection were not listed. None of

¹⁰ Although Mr. Geathers testified that OFCCP's district offices were supposed to receive an annually updated EEDS list to be used for the selection of contractors (TR at 34), nothing in the text of the Selection Order in effect in February, 2004 required OFCCP to select contractors from an EEDS list that had been annually produced or updated (DX 1 at 5).

¹¹ OFCCP is not required to produce written evidence to prove that it applied neutral criteria to its contractor selection choices. *New Orleans Pub. Serv.*, 723 F.2d at 428. The testimony of officials involved in the selection process can be sufficient to prove that the agency actually applied neutral criteria in making its selections. *Id.*

OFCCP's witnesses could explain why this was the case (*see* TR at 36-38, 76). Although Mr. Cirino testified that contractor selection dates were always "available" because OFCCP entered the selection date of every contractor selected for review into a computerized database (TR at 76-77), OFCCP did not produce evidence establishing the dates on which those 25 contractors were selected for review. Additionally, for six contractors listed above BATO on the 2002 EEDS list (contractors 7539, 7555, 7560, 7583, 7597, and 7598, *see* PX 1), there was no information regarding whether the contractor had been selected or rejected for review, and OFCCP introduced no evidence establishing whether three of those contractors (contractors 7539, 7555, and 7583) were ever selected for review (*See* DX 1; DX 2; PX 5).¹² Finally, of five contractors listed above BATO on the EEDS list that were not selected for review, but for whom a reason had not been noted on the EEDS list (contractors 7446, 7447, 7449, 7451, and 7477), OFCCP was unable to explain why two (contractors 7451 and 7477) were rejected for review (*See* DX 1; DX 2; PX 5).¹³

It is OFCCP's burden to prove not only that it had a neutral administrative plan for the selection of contractors for compliance evaluations, but also that it applied the plan neutrally. While Mr. Geathers testified that he followed OFCCP's neutral plan in selecting BATO, neither he nor any of the other OFCCP witnesses could explain whether the above-noted contractors listed above BATO on the EEDS list were selected or rejected in strict sequential order, as required by OFCCP's neutral administrative plan, or in some cases even whether they were selected or rejected. I find that OFCCP has failed to meet its burden to prove that it actually applied its neutral administrative plan to select or reject 30 contractors listed above BATO on the 2002 EEDS list. Accordingly, OFCCP has failed to prove that BATO was selected for the compliance review in accordance with OFCCP's neutral administrative plan.

Bank of America's Consent to the Desk Audit

Nevertheless, my finding that OFCCP failed to prove it selected BATO for a compliance review pursuant to its neutral administrative plan for contractor selection is not the end of the inquiry. If defendant voluntarily consented to the compliance review, there would have been no violation of the Fourth Amendment. *See Bank of America*, ARB No. 00-079, at 19 (holding that an Administrative Law Judge erred by failing to recognize that a subject's contemporaneous consent to an OFCCP search satisfies the Fourth Amendment's requirements). Based on a review of the totality of the circumstances, I find that defendant consented to the desk audit portion of the compliance review. There is no evidence demonstrating that defendant's will was overborne such that its subsequent submission of the requested documentation was rendered

¹² OFCCP introduced into evidence contractor non-scheduling documentation forms for contractors 7560, 7579, and 7598 (PX 5). These forms explained that contractor 7560 was rejected for review because it had undergone a review within the last 24 months and was out of business (*id.*). Contractors 7579 and 7598 were rejected because they do not hold federal contracts (*id.*).

¹³ OFCCP introduced into evidence contractor non-scheduling documentation forms for contractors 7446, 7447, and 7449 (PX 5). These forms explained that contractors 7446 and 7447 had been rejected on account of their involvement with the EO Survey (*id.*). Contractor 7449 was rejected because it had undergone a review within the last 24 months (*id.*).

involuntary. OFCCP's request, which was made via the February 27, 2004 scheduling letter, consists of two-pages with an attached itemized listing (PX 2). The letter informs defendant of its selection and outlines the possible stages of the compliance review, with citations to the governing regulatory authority (*id.* at 1). The letter goes on to request that defendant submit to OFCCP its AAP and other specified employment data outlined in the itemized listing (*id.* at 1-2).

Defendant did not misrepresent its authority in any way, and there is no evidence of harassment, intimidation, or threats made to effect or induce defendant's compliance. While the letter does remind defendant that §60-2.2 of the regulations authorizes the initiation of enforcement proceedings should OFCCP find that the AAP it submitted is not in compliance with the regulations, at no point in the scheduling letter does OFCCP discuss the enforcement consequences of a contractor's failure to submit materials in response to a desk audit request.¹⁴ The letter contains no language suggesting that defendant would be precluded from questioning or challenging its selection, and even provides a contact name and telephone number for defendant's questions concerning the compliance review (*id.* at 2). Finally, Ms. Bryant testified that upon defendant's receipt of the letter, she had no cause for concern since the letter was the "standard" letter used by OFCCP to schedule compliance reviews, and based on her experience and involvement with past compliance reviews, she found nothing "unusual" in the letter scheduling the desk audit for the BATO facility (TR at 93).

With respect to defendant, I note that it is a financial institution with hundreds, if not thousands, of branches throughout the United States (*see* DX 8) and was hardly a newcomer to OFCCP's compliance review process. Ms. Bryant testified that since 2000, defendant had been involved in over 200 of OFCCP's compliance reviews (TR at 92-93). Additionally, defendant was no novice when it came to challenging OFCCP's efforts to complete prior compliance reviews. Defendant has not been afraid to litigate various questions concerning OFCCP's compliance efforts at the administrative agency, Federal district and appellate levels. *See Nationsbank Corp. v. Herman*, 174 F.3d 424 (4th Cir.), *cert. denied*, 528 U.S. 1045 (1999); *NationsBank Corp. v. Herman*, Civ. No. 3:95CV103-MU (D.N.C. Nov. 1997); *Bank of America*, ARB No. 00-079.

With respect to the interactions of the parties, I find no evidence of coercive behavior on OFCCP's part that would vitiate defendant's voluntary consent to the desk audit. Following defendant's receipt of the scheduling letter, Ms. Bryant informed OFCCP that defendant was willing to cooperate with the compliance review and wanted the agency to confirm in writing the process by which BATO was selected (DX 6). As discussed, OFCCP indicated in its response

¹⁴ However, even if the scheduling letter had discussed such consequences, the regulations on this issue are clear. A contractor's refusal to submit an AAP would not automatically result in the imposition of sanctions or enforcement proceedings; OFCCP is vested with discretion in deciding to initiate proceedings upon a contractor's failure to submit the AAP. §§60-1.26(a)(1)(v) 7 (b)(1). And only after an administrative hearing, a hearing at which defendant would have an opportunity to challenge the compliance review, could sanctions be imposed. §60-1.26(b). But the mere possibility of enforcement consequences does not negate the voluntariness of defendant's consent to the desk audit.

letter that BATO had been selected “in order” from the June 17, 2002 EEDS list for Charlotte, North Carolina (DX 7). Apparently satisfied with this response, defendant went ahead and submitted the AAP and supporting data in a timely fashion. Defendant demonstrated no reluctance in submitting the requested information and made no further effort to question the circumstances regarding BATO’s selection or to “object, challenge, or otherwise disagree” with OFCCP’s rationale for its request. *Bank of America*, Case No. 1997-OFC-00016, at 15 (ALJ August 11, 2004).

Finally, OFCCP was ultimately unable to prove that it selected BATO for a compliance review pursuant to its neutral administrative plan requiring strict sequential selection. However, there is no evidence in the record that the statement concerning BATO’s selection was made to induce defendant’s compliance through trickery or deceit. Further, despite its extensive experience with the compliance review process, defendant made no effort to seek further information concerning the selection and simply submitted the AAP and supporting documentation without further question. When considered with all of the above-noted circumstances, I find that OFCCP’s statement concerning the method of BATO’s selection did not render defendant’s consent to the desk audit involuntary. Rather, there is absolutely no basis to conclude that BATO’s agreeing to the desk audit was not voluntary.

Specific Evidence of a Violation of the Executive Order

While defendant clearly consented to the desk audit portion of the compliance review, it withdrew its consent to the on-site portion. Accordingly, OFCCP’s efforts to enter BATO’s facility to conduct the on-site portion of the compliance review must be measured against the requirements of the Fourth Amendment. As OFCCP cannot demonstrate that applied its neutral administrative plan of strict sequential selection, it must demonstrate that it had a reasonable suspicion of a violation of the Executive Order.

Plaintiff argues that the regression analysis gave OFCCP the specific evidence it needed to establish a reasonable suspicion of a violation of the Executive Order. According to OFCCP, because the regression analysis contained a standard deviation in excess of two which suggested that females in certain job groups at BATO were not being compensated equally with males, plaintiff was reasonable in its belief that further investigation was necessary. Defendant counters that the regression analysis was “fatally” flawed, and that in light of Dr. Amidon’s testimony, OFCCP did not possess specific evidence of a violation of the Executive Order justifying plaintiff’s request to conduct an on-site review.

In relying on the regression analysis as its rationale for entry into the BATO facility to conduct an on-site review, OFCCP relies on an analysis which is not probative. As discussed above, Dr. Amidon pointed out the numerous methodological flaws in the regression analysis and explained that these flaws meant that no conclusions about BATO’s compensation practices could be drawn from it. Dr. Amidon’s expert opinion is unrebutted, and, perhaps tellingly, OFCCP made no serious effort, either at the hearing or in its post-hearing brief, to contradict her testimony. Thus, although the regression analysis appears to reveal a disparity in employee pay between men and women in excess of two standard deviations, it cannot be relied on justify an on-site review. Accordingly, I find that the regression analysis is insufficient evidence upon

which to base a reasonable belief that BATO's compensation practices violated the Executive Order.

However, there is no requirement that OFCCP base its decision to seek an on-site review on a regression analysis. That the regression analysis lacks probative value does not mean that OFCCP lacked a reasonable basis to conduct such an on-site review. OFCCP's September 23, 2004 letter informing defendant of the results of the desk audit contains a table based on data obtained from the desk audit listing the average salaries for 278 males and females in certain job groups (job groups 1A, 1B, 1C, 2A, 2B, 2C, and 3A) (PX 3). The table indicates that the average salary for male employees in those job groups was anywhere from 9.08% to 23.33% higher than the average salary for female employees (*id.*). An additional table lists the average salaries for 114 minorities and non-minorities in certain job groups (job groups 1B, 1C, 2A, and 3A) (*id.*). This table indicates that the average salary for non-minority employees was anywhere from 5.18% to 23.15% higher than the average salary of minority employees (*id.*). This data from the desk audit provides OFCCP with a reasonable basis for a belief that violations of the Executive Order may be occurring, supporting the agency's request for an on-site review. Given this raw data, one wonders why OFCCP thought it needed a regression analysis to justify an on-site review. There is no evidence in the record that defendant challenged the data contained in the September 23 letter. Given these disparities in salaries on the basis of gender and minority status, it is reasonable for OFCCP to further its investigation. Accordingly, OFCCP has established that it had specific evidence sufficient to justify an on-site review of the BATO facility, and therefore such an on-site review comports with the Fourth Amendment's requirements.

RECOMMENDED ORDER

IT IS ORDERED that not later than 30 days from the issuance of this Order, Bank of America shall permit the Office of Federal Contract Compliance Programs, U.S. Department of Labor, to access its premises at 200 North College Street, Charlotte, North Carolina, to conduct an on-site review in accordance with §60-1.20(a)(1)(ii).

A

JEFFREY TURECK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file exceptions ("Exception") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's recommended decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Any request for an extension of time to file the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the Exception is due. *See* 41 C.F.R. §60-30.28.

On the same date you file the Exception with the Board, a copy of the Exception must be served on each party to the proceeding. Within fourteen (14) days of the date of receipt of the Exception by a party, the party may submit a response to the Exception with the Board. Any request for an extension of time to file a response to the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the response is due. *See* 41 C.F.R. §60-30.28. Even if no Exception is timely filed, the administrative law judge's recommended decision, along with the record, is automatically forwarded to the Board for a final